

**ASSEMBLY BILL**

**No. 43**

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**Introduced by Assembly Members Leno, Laird, and Lieber**

(Principal coauthors: Senators Kehoe, Kuehl, Migden, and Perata)

**(Coauthors: Assembly Members Alarcon, Berg, Brownley, Coto, De Leon, Eng, Evans, Feuer, Hancock, Hayashi, Huffman, Jones, Levine, Ma, Mullin, Portantino, Ruskin, Saldana, and Soto)**

(Coauthors: Senators Alquist, Calderon, Cedillo, Lowenthal, Oropeza, Romero, Steinberg, Torlakson, Wiggins, and Yee)

December 4, 2006

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An act to amend Sections 300, 301, and 302 of, and to add Section 403 to, the Family Code, relating to marriage.

LEGISLATIVE COUNSEL'S DIGEST

AB 43, as introduced, Leno. Gender-neutral marriage.

Existing law provides that marriage is a personal relation arising out of a civil contract between a man and a woman. Existing law provides for the issuance of marriage licenses and imposes duties on county clerks in that connection, as specified. Existing law, enacted by initiative measure, further provides that only marriage between a man and a woman is valid or recognized in this state.

This bill would enact the Religious Freedom and Civil Marriage Protection Act, which would instead provide that marriage is a personal relation arising out of a civil contract between 2 persons. The bill would make conforming changes with regard to the consent to, and solemnization of, marriage, and would make related findings and declarations.

By adding to the duties of county employees, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. This act shall be known and may be cited as the  
2 Religious Freedom and Civil Marriage Protection Act.

3 SEC. 2. It is the intent of the Legislature that this act be  
4 interpreted consistently with the guarantees of the First Amendment  
5 to the United States Constitution and of Section 4 of Article I of  
6 the California Constitution to free exercise of religion and  
7 enjoyment of religion without discrimination or preference.

8 SEC. 3. The Legislature finds and declares as follows:

9 (a) Civil marriage is a legal institution recognized by the state  
10 in order to promote stable relationships and to protect individuals  
11 who are in those relationships. The institution of marriage also  
12 provides important protections for the families of those who are  
13 married, including not only any children or other dependents they  
14 may have, but also members of their extended families.

15 (b) From 1850 to 1977, California's marriage statutes used  
16 gender-neutral language, without reference to "man" or "woman,"  
17 in providing that marriage is a personal relation arising out of a  
18 civil contract to which the consent of the parties capable of making  
19 the contract is necessary.

20 (c) In 1948, the California Supreme Court became the first state  
21 court in the country to strike down a law prohibiting interracial  
22 marriage. It was the only state supreme court to do so before the  
23 United States Supreme Court invalidated all those laws in 1967.  
24 The California Supreme Court held that "marriage is ... something  
25 more than a civil contract subject to regulation by the state; it is a  
26 fundamental right of free men ... Legislation infringing such rights  
27 must be based upon more than prejudice and must be free from  
28 oppressive discrimination to comply with the constitutional

1 requirements of due process and equal protection of the laws”  
2 (*Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715). The California  
3 Supreme Court explained that “the right to marry is the right to  
4 join in marriage with the person of one’s choice” (*Id.*, at p. 715).

5 (d) In 1977, the Legislature amended the state’s marriage law  
6 to replace the gender-neutral description of marriage with language  
7 specifically limiting marriage to a “civil contract between a man  
8 and a woman.” The Legislature’s express purpose for this  
9 amendment was to prohibit same-sex couples from marrying. The  
10 gender-specific description of marriage that the Legislature adopted  
11 in 1977 specifically discriminated in favor of heterosexual couples  
12 and discriminated against, and continues to discriminate against,  
13 same-sex couples.

14 (e) Other jurisdictions have chosen to treat as valid or otherwise  
15 recognize marriages between same-sex couples. California’s  
16 discriminatory marriage law therefore also harms California’s  
17 same-sex couples when they travel to other jurisdictions by  
18 preventing them from having access to the rights, benefits, and  
19 protections those jurisdictions provide only to married couples.

20 (f) By excluding same-sex couples from marriage, California’s  
21 marriage law discriminates against members of same-sex couples  
22 based on their sexual orientation and based on their gender. The  
23 exclusion of same-sex couples from marriage is based in significant  
24 part on, and perpetuates, gender stereotypes about the roles of men  
25 and women in families and in society.

26 (g) California’s discriminatory exclusion of same-sex couples  
27 from marriage harms same-sex couples and their families by  
28 denying those couples and their families specific legal rights and  
29 responsibilities under state law and by depriving members of those  
30 couples and their families of a legal basis to challenge federal laws  
31 that deny access to the many important federal benefits and  
32 obligations provided only to spouses (*Smelt v. County of Orange*  
33 (9th Cir. 2006) 447 F.3d 673, 684-685). Those federal benefits  
34 include the right to file joint federal income tax returns, the right  
35 to sponsor a partner for immigration to the United States, the right  
36 to social security survivor’s benefits, the right to family and  
37 medical leave, and many other substantial benefits and obligations.

38 (h) Other jurisdictions have chosen to treat as valid or otherwise  
39 recognize marriages between same-sex couples. California’s  
40 discriminatory marriage law therefore also harms California’s

1 same-sex couples when they travel to other jurisdictions by  
2 preventing them from having access to the rights, benefits, and  
3 protections those jurisdictions provide only to married couples.

4 (i) California's discriminatory exclusion of same-sex couples  
5 from marriage further harms same-sex couples and their families  
6 by denying them the unique public recognition and validation that  
7 marriage confers.

8 (j) The Legislature has an interest in encouraging stable  
9 relationships regardless of the gender or sexual orientation of the  
10 partners. The benefits that accrue to the general community when  
11 couples undertake the mutual obligations of marriage accrue  
12 regardless of the gender or sexual orientation of the partners.  
13 Despite longstanding social and economic discrimination, many  
14 lesbian, gay, and bisexual Californians have formed lasting,  
15 committed, and caring relationships with persons of the same sex.  
16 These couples share lives together and participate in their  
17 communities together, and many raise children and care for other  
18 dependent family members together. Permitting same-sex couples  
19 to marry would further California's interests in promoting family  
20 relationships and protecting family members during life crises.  
21 Lesbian, gay, and bisexual Californians have the same interests in  
22 marriage and in personal autonomy and privacy, including  
23 marrying the person of one's choice, as heterosexual Californians.

24 (k) Despite the intentions of California's domestic partnership  
25 statutes to reduce discrimination on the bases of sex and sexual  
26 orientation and to help California move closer to fulfilling the  
27 promises of inalienable rights, liberty, and equality contained in  
28 Sections 1 and 7 of Article I of the California Constitution,  
29 relegating same-sex couples to the status of domestic partnership  
30 while prohibiting them from marrying (1) causes severe and lasting  
31 harms to same-sex couples, their children, and their extended  
32 families; (2) stigmatizes same-sex couples, their children, their  
33 extended families and all gay, lesbian, and bisexual Californians  
34 in violation of the California Constitution; (3) violates California  
35 public policy by enabling and promoting discrimination by private  
36 actors and institutions on the basis of sexual orientation, contrary  
37 to California's compelling interest in eradicating discrimination  
38 based on sexual orientation; and (4) puts same-sex couples and  
39 their families at risk of illegal discrimination by state and local  
40 government agencies and officials.

(l) It is the intent of the Legislature in enacting this act to end the pernicious practice of marriage discrimination in California. California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantees of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians. California's exclusion of same-sex couples from marriage serves no legitimate government interest and is contrary to the public policies of California. The harms caused by prohibiting same-sex couples from marrying in California cannot be remedied, as required by the California Constitution, by any measure short of permitting same-sex couples to marry in California.

(m) This act is in no way intended to alter Section 308.5 of the Family Code, which prohibits California from treating as valid or otherwise recognizing marriages of same-sex couples solemnized outside of California.

SEC. 4. Section 300 of the Family Code is amended to read:

300. (a) Marriage is a personal relation arising out of a civil contract between ~~a man and a woman~~ *two persons*, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).

(b) *Where necessary to implement the rights and responsibilities of spouses under the law, gender-specific terms shall be construed to be gender-neutral, except with respect to Section 308.5.*

~~(b)~~

(c) *For purposes of this part, the document issued by the county clerk is a marriage license until it is registered with the county recorder, at which time the license becomes a marriage certificate.*

SEC. 5. Section 301 of the Family Code is amended to read:

301. ~~An~~ *Two* ~~unmarried male persons~~ of the age of 18 years or older, ~~and an unmarried female of the age of 18 years or older,~~ *and who are* not otherwise disqualified, are capable of consenting to and consummating marriage.

SEC. 6. Section 302 of the Family Code is amended to read:

302. (a) ~~An unmarried male or female person~~ under the age of 18 years is capable of consenting to and consummating marriage

1 upon obtaining a court order granting permission to the underage  
2 person or persons to marry.

3 (b) The court order and written consent of the parents of each  
4 underage person, or of one of the parents or the guardian of each  
5 underage person shall be filed with the clerk of the court, and a  
6 certified copy of the order shall be presented to the county clerk  
7 at the time the marriage license is issued.

8 SEC. 7. Section 403 is added to the Family Code, to read:

9 403. No priest, minister, or rabbi of any religious denomination,  
10 and no official of any nonprofit religious institution authorized to  
11 solemnize marriages, shall be required to solemnize any marriage  
12 in violation of his or her right to free exercise of religion guaranteed  
13 by the First Amendment to the United States Constitution or by  
14 Section 4 of Article I of the California Constitution.

15 SEC. 8. The Legislature finds and declares that this act does  
16 not amend or modify Section 308.5 of the Family Code, as enacted  
17 by an initiative measure, to the extent that Section 308.5 addresses  
18 only marriages from other jurisdictions.

19 SEC. 9. If the Commission on State Mandates determines that  
20 this act contains costs mandated by the state, reimbursement to  
21 local agencies and school districts for those costs shall be made  
22 pursuant to Part 7 (commencing with Section 17500) of Division  
23 4 of Title 2 of the Government Code.